unreasonably discriminatory basis. We therefore are concerned that relieving Qwest from this obligation might result in prices that do not satisfy that standard.[255] On the basis of the analysis above, we conclude that Qwest's Petition does not satisfy the standard for forbearance set forth in section 10(a)(1) for any services Qwest must provide pursuant to checklist items 4 through 6.

104. The economic barriers to self-providing facilities can be substantial,[256] and "can differ from city to city, within the same city, or between a city and its suburbs because of differences in municipal right-of-way and permitting policies, as well as conduit availability," among other factors.[257] When the Commission established its impairment determinations, it did so at a level designed to provide incentives for self-provisioning competitive facilities, rather than based on a finding that in all cases self-provisioning of competitive facilities is economically feasible.[258] As a result, the Commission's impairment determinations necessarily sometimes are under-inclusive.[259] In other words, it sometimes is not feasible for a reasonably efficient competitive carrier economically to construct all of the facilities necessary to provide a telecommunications service to a particular customer despite not being impaired under the Commission's rules without access to such facilities.[260] In addition, even when it is economically feasible for a reasonably efficient competitor to construct such facilities, "the construction of local loops generally takes between six to nine months absent unforeseen delay."[261] In order to provide service to customers, competitive LECs therefore may require wholesale access to Qwest's network on a temporary basis while they construct their own facilities to their customers' premises.[262] If carriers lacked wholesale access to Qwest's network elements in such cases, they sometimes would not be able to provide service to that customer. The record contains no evidence to indicate that such an outcome would be a rare occurrence.

105. In addition, if we would now forbear from sections 271(c)(2)(B)(iv) and (v), we could no longer fully rely on two of the three bases upon which we based our conclusion that forbearance from section 251(c)(3) obligations for loops and transport in certain wire centers is warranted. Our justification for forbearing from Qwest's section 251(c)(3) obligations for loops and transport in certain areas depends in part on the continued applicability of Qwest's wholesale obligations to provide these network elements under sections 271(c)(2)(B)(iv) and (v). Specifically, we determined above to forbear in certain wire centers from the application of section 251(c)(3) to loops and transport in the Omaha

[255] *See Triennial Review Order*, 18 FCC Rcd 17386, para. 656.

[256] *See, e.g., Triennial Review Remand Order*, 20 FCC Rcd at 2615-18, paras. 149-54.

[257] *See, e.g., id.* at 2579, para. 73 n.209.

[258] *See id.*

[259] *See USTA II*, 359 F.3d at 570 (noting "the inevitability of some over-and under-inclusiveness in the Commission's unbundling rules").

[260] *See, e.g., Triennial Review Remand Order*, 20 FCC Rcd at 2547-49, paras. 24-28 (discussing the reasonably efficient competitor standard).

[261] *See id.* at 2616, para. 151 (discussing factors that might create much longer delays).

[262] *See id.* at 2635, para. 185 (explaining that carriers will only construct fiber loops in order to serve a demand for service from a customer).

MSA based on facilities-based competition provided by Cox, *and* based on retail competition that in part depends on Qwest's wholesale offerings, *and* based on the potential competition facilitated by the Commission's other rules, including the checklist items under discussion here. We therefore see no tension in granting Qwest forbearance from section 251(c)(3) unbundling obligations for loops and transport even though we do not grant Qwest forbearance from section 271 wholesale access obligations. We note that in granting Qwest forbearance from its obligation to provide unbundled access to loops and transport pursuant to section 251(c)(3), consistent with the language of the Act, we determined that the application of *section 251(c)(3)* with its TELRIC pricing standard was not necessary in certain wire centers to ensure that the standards of section 10(a) are satisfied. We did *not* determine that Qwest's provision of wholesale access to loops and transport was no longer necessary to ensure that the standards of section 10(a) are satisfied. As just explained, we reached the opposite conclusion, and affirm that conclusion here as applied to Qwest's wholesale access obligations under checklist items 4 through 6, which operate under the just, reasonable and non-discriminatory pricing standard.

106. Our determination today not to grant Qwest additional forbearance relief from its unbundling obligations under sections 271(c)(2)(B)(iv)-(vi) for its legacy elements also finds support in the Commission's *Section 271 Broadband Forbearance Order*. There, the Commission found that the "broadband market is still an emerging and changing market, where . . . the preconditions for monopoly are not present."[263] Specifically, the Commission recognized that numerous intermodal broadband competitors are beginning to emerge and that cable modem providers have already had success in acquiring residential and small-business customers.[264] Further, the Commission recognized that, in order effectively to compete for the provision of broadband services, the BOCs generally would need to upgrade their networks substantially with new fiber technologies. However, because section 271 unbundling obligations create disincentives for the BOCs to make substantial investments in these new fiber technologies, in accord with our nation's policy goals of trying to provide all carriers, including BOCs, with incentives to make such investments, the Commission concluded that forbearance relief was justified.[265] As additional support for its decision in the *Section 271 Broadband Forbearance Order*, the Commission stressed its expectation that the emerging competition from "*multiple sources and technologies* in the retail broadband market," would be likely to "pressure the BOCs to utilize wholesale customers to grow their share of the broadband markets and thus the BOCs will offer such customers

[263] *See Section 271 Broadband Forbearance Order*, 19 FCC Rcd at 21505, para. 22.

[264] The Commission noted at the time that focusing its analysis to this degree on the retail market was unusual. *See id.* at 21505, para. 20 (noting that "[a]lthough in other forbearance orders, the Commission placed emphasis on the wholesale aspect of the 10(a)(1) prong," with respect to its analysis of these new fiber technologies, it was "appropriate to consider the wholesale market in conjunction with competitive conditions in the downstream retail broadband market").

[265] Specifically, the Commission concluded that "the developing nature of the broadband market at both the wholesale and retail levels, including the ongoing introduction of new services and deployment of new facilities, leads us to conclude that the contribution of section 271 unbundling requirements to ensuring just and reasonable charges and practices is relatively modest – particularly at the retail level – and outweighed by the greater competitive pressure that would be brought to bear on all providers if the section 271 unbundling requirements were lifted." *Id.* at 21505, para. 21; *see also* 47 U.S.C. § 157 nt (directing the Commission to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans" by using regulatory measures that "promote competition in the local telecommunications market" and "remove barriers to infrastructure investment").

reasonable rates and terms in order to retain their business."[266] Furthermore, the Commission held that even if its prediction were wrong that competitive providers of retail broadband services would be able to rely on reasonably priced wholesale broadband offerings, these competitive providers would "still be able to access other network elements to compete in the broadband market."[267] Qwest now seeks additional forbearance relief from any obligation to make these "other network elements" available.

107. The reasoning that formed the basis of the Commission's decision to forbear from applying the section 271 network access requirements to certain of the BOCs' broadband facilities does not extend to Qwest's legacy elements. The supply market for legacy services is quite different from the supply market for broadband services. As explicitly recognized in section 706, it is important for this Commission to remove investment disincentives that apply to *broadband* services in order to encourage the construction of next generation facilities to customers nationwide. In contrast, the policies of section 706 do not apply to already-constructed legacy elements.[268] In this context, we see no reason to forbear from section 271(c) obligations in order to provide Qwest additional incentive to upgrade its legacy network facilities. We also see no reason to forbear from section 271(c) obligations to give Qwest's competitors additional incentive to construct their own facilities, because the section 271(c) obligations do not require Qwest to provide wholesale access under a cost-based pricing requirement.[269] Instead, we believe that the competitive market pressures evident in the Omaha MSA create appropriate incentives that will guide Qwest and its competitors in their decisions regarding when to upgrade their facilities or construct new facilities to better serve legacy customers.

(ii) Section 10(a)(2) – Protection of Consumers

108. In order to forbear from applying to Qwest the section 271(c)(2)(B) obligations to provide access to loops, transport and switching in the Omaha MSA, section 10(a)(2) requires us to analyze whether such application is necessary to ensure the protection of consumers.[270] For reasons similar to those that persuade us that Qwest has not demonstrated that these requirements as applied to its legacy elements are not necessary within the meaning of section 10(a)(1), we also conclude that Qwest has not demonstrated that these requirements are unnecessary for the protection of consumers under section 10(a)(2). Because we have explained these reasons at length above, we do not repeat that discussion here.

(iii) Section 10(a)(3) – Public Interest

109. Finally, Qwest has not shown that it satisfies the requirements of section 10(a)(3). Section 10(a)(3) requires us to analyze whether forbearance would be consistent with the public interest.[271]

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[266] *Section 271 Broadband Forbearance Order*, 19 FCC Rcd at 21508, para. 26 (emphasis added).

[267] *Id.*

[268] *See* CompTel Sept. 9, 2005 *Ex Parte* Letter at 2 (arguing that there is no linkage between deregulation of existing legacy telecommunications facilities and new investment).

[269] *See supra* Part III.D.1.c (discussing the costs of unbundling).

[270] 47 U.S.C. § 160(a)(2).

[271] *Id.* at § 160(a)(3).

Specifically, we must consider whether forbearance from the application to Qwest of its obligations under checklist items 4 through 6 "will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services."[272] We do not believe eliminating Qwest's section 271 access obligations for legacy facilities would enhance competition in the Omaha MSA as contemplated in section 10.

110. In the Omaha MSA, where retail competition often is based on the use of Qwest's facilities, eliminating the requirement to provide wholesale access to Qwest's loops, switching and transport elements is likely to result in a reduction of the very competition Qwest relies on to justify granting its Petition.[273] We find that competitors in the Omaha MSA continue to need access to Qwest's facilities to serve many locations. For instance, AT&T claims that even in the most densely populated areas of the MSA, where competitive deployment is in general most likely, it "is still dependent upon Qwest facilities for the vast majority of its enterprise customer locations."[274] Cox appears to be Qwest's only competitor in this market to compete primarily over its own last-mile facilities – and yet Cox does not provide coverage in a significant portion of Qwest's service area.[275] The record does not reflect any significant alternative sources of wholesale inputs for carriers in this geographic market.[276] We are not willing, nor are we able under the Act, to undercut the basis of this competition in the absence of a demonstration that relieving Qwest from its section 271 obligations would be consistent with the public interest and promote competitive market conditions by enhancing competition among providers of telecommunications services. Qwest has not made this showing and we must therefore deny its request.

F. Regulation as an Incumbent Local Exchange Carrier

111. We reject Qwest's request for forbearance from regulation as an incumbent LEC in the Omaha MSA, because Qwest fails sufficiently to identify the objects of its request and fails to explain how granting its request would affect the public interest and other criteria of section 10(a).[277] Qwest states that it seeks "forbearance from regulation as an ILEC pursuant to section 251(h)(1)."[278] Section 251(h)(1) is the section of the Act that defines "incumbent LEC."[279] Qwest does not point to any

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[272] *Id.* at § 160(b).

[273] *Id.* at § 160(b). While Qwest contends that "[c]ompetitive providers have other market entry options in those areas where they choose not to deploy facilities," the record does not support this contention to the extent Qwest claims a wholesale market exists for telecommunications services relevant to this proceeding. Qwest Petition at 17.

[274] AT&T Selwyn Decl. at paras. 18, 51.

[275] Cox, which Qwest cites as its strongest competitor in the Omaha MSA, apparently has no coverage whatsoever in **[REDACTED]** of the 24 wire centers that make up Qwest's territory, and only limited coverage in many of Qwest's other wire centers in this market. *See* Cox June 30, 2005 *Ex Parte* Letter.

[276] *See supra* note 176.

[277] *See* Petition at 37-39.

[278] *Id.* at 38.

[279] *See* 47 U.S.C. § 251(h)(1). Qwest states that one route to granting its forbearance request would be first to declare Cox an incumbent LEC, based in part on a finding that Cox has "substantially replaced" Qwest as the incumbent LEC in the Omaha MSA, and then forbear from incumbent LEC regulation as applied to both Qwest and (continued....)

substantive obligations of incumbent LECs from which it might seek relief. Other than the section 251(c) claims that Qwest pleads and we evaluate separately, the only regulation Qwest identifies as applying to it as a result of its status as an incumbent LEC – section 54.309(a) of the Commission's rules - is a regulation from which Qwest does not seek forbearance.[280] Neither Qwest nor any commenter has pointed to any authority that would compel the Commission to infer which regulations or statutory provisions are encompassed by Qwest's general request. We decline to speculate from what regulations or provisions of the Act Qwest would like forbearance other than those it specifically identifies, and then to compose on Qwest's behalf an affirmative case for such relief.[281]

IV. EFFECTIVE DATE

112. Consistent with Section 10 of the Act and our rules, the Commission's forbearance decision shall be effective on Friday, September 16, 2005.[282] The time for appeal shall run from the release date of this order.[283]

V. ORDERING CLAUSES

113. Accordingly, IT IS ORDERED that, pursuant to section 160 of the Communications Act of 1934, as amended, 47 U.S.C. § 160(d), Qwest Corporation's Petition for Forbearance is GRANTED to the extent described herein and is otherwise DENIED.

(Continued from previous page)

Cox. *See* Petition at 38 (acknowledging that such a process would be inefficient). Section 251(h) provides that the Commission may "*by rule*, provide for the treatment of a LEC" as an incumbent LEC if certain conditions are met. 47 U.S.C. § 251(h)(2) (emphasis added); *see also Petition of Mid-Rivers Telephone Cooperative, Inc. for Order Declaring it to be an Incumbent Local Exchange Carrier in Terry, Montana Pursuant to Section 251(h)(2)*, WC Docket No. 02-78, Notice of Proposed Rulemaking, 19 FCC Rcd 23070 (2004) (opening a rulemaking proceeding to determine how section 251(h)(2) should be applied to the specific factual situation in Terry, Montana as well as to future petitions filed under section 251(h)(2)). Because the present proceeding is not a rulemaking proceeding, we do not reach the merits of Qwest's suggestion. *See* Letter from David Cosson, Counsel to Mid-Rivers Telephone Cooperative, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-223 (filed Sept. 7, 2005) (stating that the petition filed by Mid-Rivers pursuant to section 251(h) and Qwest's Petition "are brought under different provisions of the Communications Act").

[280] *See* Petition at 38 n.108.

[281] *Cf. Petition of SBC Communications Inc., for Forbearance from the Application of Title II Common Carrier Regulation to IP Platform Services*, Memorandum Opinion and Order, WC Docket No. 04-29, 20 FCC Rcd 9361, 9366-67, paras. 14-17 (2005) (denying forbearance petition for, *inter alia*, lack of specificity).

[282] *See* 47 U.S.C. § 160(c) (deeming the petition granted as of the forbearance deadline if the Commission does not deny the petition within the time period specified in the statute); 47 C.F.R. § 1.103(a).

[283] *See* 47 C.F.R. §§ 1.4, 1.13.

114. IT IS FURTHERED ORDERED that, pursuant to section 10 of the Communications Act of 1934, 47 U.S.C. § 160, and section 1.103(a) of the Commission's rules, 47 C.F.R. § 1.103(a), the Commission's forbearance decision SHALL BE EFFECTIVE on September 16, 2005. Pursuant to sections 1.4 and 1.13 of the Commission's rules, 47 C.F.R. §§ 1.4 and 1.13, the time for appeal shall run from the release date of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX
LIST OF COMMENTERS

Comments in WC Docket No. 04-223

Comments	Abbreviation
Association for Local Telecommunications Services	ALTS
AT&T Corp.	AT&T
CompTel/ASCENT	CompTel
Cox Communications, Inc.	Cox
Independent Telephone & Telecommunications Alliance	ITTA
Iowa Utilities Board	Iowa Utils. Bd.
McLeodUSA Telecommunications Services, Inc.	McLeodUSA
MCI, Inc.	MCI
Sprint Corporation	Sprint
Time Warner Telecom	TWTC

Replies in WC Docket No. 04-223

Replies	Abbreviation
Ad Hoc Telecommunications Users Committee	Ad Hoc
BellSouth Corporation	BellSouth
Nebraska Public Service Commission	Nebraska PSC
Qwest Corporation	Qwest
SBC Communications Inc.	SBC
United States Telecom Association	USTA
Verizon Telephone Companies	Verizon

STATEMENT OF CHAIRMAN KEVIN J. MARTIN

Re: *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order (WC Docket No. 04-223)

With this Order, we witness the fruits of the Telecommunications Act of 1996. In the nearly 10 years since the passage of this Act, Cox has become a formidable competitor to Qwest in the Omaha MSA. Accordingly, based on the specific market facts that have been placed before us, we are compelled under the "pro-competitive, deregulatory" framework established by Congress, as well as under section 10's forbearance criteria, to grant Qwest relief from the continued application of legacy regulations.

This Order is significant in two respects. First, it is first time that we have forborne from enforcing unbundling requirements under section 251(c). Second, it is the first time that we have relieved an incumbent LEC of legacy dominant carrier regulation in the mass market. Cox has made a substantial infrastructure investment in the Omaha MSA and has used these facilities to provide competing telephone services to over a hundred thousand residential and business customers.

This success of intermodal competition warrants the Commission's careful exercise of its forbearance authority. Notably, the relief we grant today is balanced and limited to the areas in which Cox has the most significant facilities presence. For example, we grant unbundling relief only in those wire centers where Cox facilities pass a substantial number of end-user locations served by a particular wire center. In those areas where Cox does not have such an extensive presence, no unbundling relief is granted. Accordingly, I believe this Order strikes the right balance.

CONCURRING STATEMENT OF COMMISSIONERS MICHAEL J. COPPS AND JONATHAN S. ADELSTEIN

Re: *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order (WC Docket No. 04-223)

In today's decision, the Commission grants forbearance from certain unbundling and dominant carrier obligations in areas of the Omaha MSA where a facilities-based carrier has extensively built out its network and taken significant market share from the incumbent wireline provider. While we support the outcome in this Order and believe it is clearly superior to an automatic grant of the underlying petition, we have concerns with the analysis in this decision. As a result, we choose to concur.

The goal of the Telecommunications Act of 1996 is to establish a "pro-competitive, de-regulatory national policy framework." Today's decision lives up to this charge only in part. This item certainly reduces regulation by eliminating some incumbent obligations and demonstrates that the Commission can respond to the dynamic marketplace. But we fall short when it comes to promoting competition. The Commission relies on the intermodal efforts of a single alternative provider—a provider with substantially greater resources than other competitors—to conclude that the Omaha MSA is fully competitive and to carve away both retail and wholesale obligations. While we agree that there is especially strong evidence of competition between the incumbent cable and wireline providers in this market, we believe the statute contemplates more than just competition between a wireline and cable provider—and that both residential and business consumers deserve more.